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BEFORE THE

Federal Communications Commission

AUG 15 1991

WASHINGTON, D.C.

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ADMINISTRATIVE SERVICES

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Application of  
JAMES KILLINGER CORNICK  
For Construction Permit for a  
New FM Station on Channel 278A  
at Marion, Virginia

File No. BPH-910311MA

To: The Chief, FM Branch

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FM EXAMINERS

REPLY TO OPPOSITION TO PETITION TO DISMISS OR DENY

Cope II Broadcasting Partners ("Cope II"), by its attorneys and pursuant to Sections 73.3584(b) and 1.45 of the Commission's Rules, hereby replies to the Opposition to Petition to Dismiss or Deny ("Opposition") filed by James Killinger Cornick on August 6, 1991. As set forth herein, Cornick's Opposition is grossly untimely and devoid of any colorable justification for its untimeliness, and should therefore be stricken without consideration. Further, Cornick's substantive arguments for acceptance of his patently defective application (and impermissible amendment thereto) fail to withstand even the slightest scrutiny. For these reasons, Cornick's above-captioned application should be dismissed.

1. Cope II, a mutually exclusive applicant for Channel 278A at Marion, Virginia, filed its Petition to Dismiss or Deny Cornick's application ("Petition") on July 2, 1991 -- within the time period set by the Commission for the filing of such

time period set by the Commission for the filing of such petitions.<sup>1/</sup> In its Petition, Cope II demonstrated that, contrary to the engineering showing in Cornick's application (which invoked the "contour protection" provisions of Section 73.215 of the Commission's Rules), prohibited contour overlap would in fact occur between Cornick's proposed Marion facility and co-channel FM station WIMZ-FM, Channel 278C, Knoxville, Tennessee. As Cornick had failed to amend his application within the 30-day amendment following public notice of his application for tender, Cope II demonstrated that Cornick's application was inadvertently accepted for filing and must be returned or dismissed.

2. Under Sections 1.45 and 1.4 of the Commission's Rules, Cornick was to have submitted his Opposition to Cope II's Petition on or before July 17, 1991. But Cornick's Opposition was not filed until nearly three weeks after the deadline. At no time did Cornick request an extension of time to file his Opposition. Cornick merely drops a casual footnote requesting leave to file his grossly untimely Opposition "[t]o the extent necessary," stating only that "additional time was necessary for engineering analysis and preparation of [a contemporaneously filed amendment to the application]."

3. Cornick has made a mockery of the Commission's procedural rules, and his Opposition must be stricken without consideration. Applicants such as Cornick simply cannot be

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<sup>1/</sup> See Public Notice, Report NA-148, Mimeo No. 13247 (released May 29, 1991).

allowed to disregard the timeframes set forth in the Commission's procedural rules -- particularly where, as here, Cornick did not lift a finger to request an extension of time to file his Opposition. Moreover, Cornick's belated excuse for his tardiness -- the "additional time" necessary for engineering analysis and preparation of an amendment -- is absurd. Cornick's own consulting engineer concedes, in a declaration attached to the Opposition, that he was informed of Cope II's technical allegations on July 3, 1991, and that he "immediately began preparation of an amendment to the application." Cornick cannot seriously claim that it took his engineer over a month to perform this task, as most reputable consulting engineers routinely complete similar tasks in far shorter time, and Cornick offers not a single reason why the engineering work took so long. Cornick has callously and without justification disregarded the Commission's procedural rules, and the integrity of those rules can be preserved only by summarily striking his Opposition without further consideration.

4. Even were Cornick's Opposition entitled to any consideration, it is totally devoid of merit. Importantly, Cornick does not even attempt to respond to Cope II's demonstration of the technical deficiency in his application. To the contrary, Cornick concedes that his contour protection showing was erroneous, and that his facility as proposed in the application violates Section 73.215. Cornick is able to do no more than amend his application to cure this deficiency, and

offer procedural arguments for retention of his application in the processing line and acceptance of his proffered amendment.<sup>2/</sup>

5. These arguments are notable only in their patent incorrectness. Cornick rests his case on the Commission's Statement of New Policy Regarding Commercial FM Applications That Are Not Substantially Complete Or Are Otherwise Defective, 65 R.R.2d 1664, 1666 (1988), to the extent it addresses treatment of applications which are "accepted for filing but . . . subsequently found not to be grantable." Thus, Cornick in essence argues that his application's violation of Section 73.215 constitutes a "grantability" defect, and he should therefore be allowed a curative amendment to correct the deficiency.<sup>3/</sup>

6. This contention is flatly wrong. Cornick's application violates Section 73.215 of the Commission's Rules. As the very

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<sup>2/</sup> Cornick contemporaneously filed a petition for leave to submit his curative amendment, and Cope II is filing this date a separate Opposition to that petition.

<sup>3/</sup> Cornick asserts that "[i]n adopting the new § 73.215, the Commission intended that this policy apply," citing Public Notice, Processing of FM Applications, 65 R.R.2d 1663 (1989), to which is attached the 1988 Statement. That Public Notice, however, provides no such support for Cornick. The Public Notice did nothing more than set forth a new tenderability requirement for FM applications -- i.e., that applicants invoking Section 73.215 must expressly request processing pursuant to the new rule and include an appropriate exhibit demonstrating compliance. Cope II has not disputed the fact that Cornick's application at least contained the appropriate contour protection exhibit, in compliance with this tenderability requirement. It is much too far a stretch, however, for Cornick to argue that by its attachment of the Statement, the Public Notice in any way intimated that Section 73.215 applications with deficient (though present) contour protection exhibits would be allowed to amend at any point to cure the deficiency. Indeed, the attached Statement does not even mention Section 73.215, and represents nothing more than a list of prior tenderability requirements for public notice purposes.

Statement cited by Cornick makes clear, "whether [the application] is in compliance with applicable Commission Rules" is an issue of the application's "acceptability for filing" (emphasis added), not its grantability.<sup>4/</sup> 65 R.R.2d at 1666. Indeed, the opening sentence of Section 73.215 states that "[t]he Commission will accept applications" (emphasis added) specifying short-spaced antenna locations, provided they meet the contour protection requirements specified therein. Moreover, the Commission has expressly held that applications failing to meet Section 73.215's requirements are "technically unacceptable for filing." Lion's Share Broadcasting, DA 91-837 (M.M. Bur., released July 24, 1991)(emphasis added).<sup>5/</sup>

7. Cornick, therefore, cannot take solace in the Statement he cites. His is not an application which is acceptable for

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<sup>4/</sup> Defects going to the grantability of an application would include, for instance, lack of site availability, lack of FAA clearance, and -- under the old Commission standards -- lack of a positive financial certification.

<sup>5/</sup> In Lion's Share Broadcasting and several other recent hearing designation orders, the Mass Media Bureau has allowed applicants whose Section 73.215 proposals would result in prohibited overlap to amend their applications on the ground that "the wording of Section 73.215(b)(ii) does not . . . afford applicants full and explicit notice of the prerequisites they must meet to avoid summary dismissal." Cornick, however, has not claimed that he had insufficient notice of Section 73.215's requirements. Rather, he simply concedes that his contour protection showing contained an error. Thus, unlike Lion's Share and similar cases, there is no basis for any result other than the dismissal of Cornick's application as inadvertently accepted for filing. A consulting engineer's error is no excuse for allowing a late-filed amendment, see R.A.D. Broadcasting Corp., 4 FCC Rcd 1772 (1989), and allowing Cornick to amend on this basis would, in effect, offer all Section 73.215 applicants a "second bite at the apple" which is not afforded to fully spaced applicants.

filing but ungrantable. Rather, it is an application which is unacceptable for filing, and which was accepted for filing inadvertently. While Cornick suggests that the Commission's having placed his application on a public notice of acceptance for filing renders the application acceptable for filing for all time, this is clearly not the case. Cornick apparently has not read the plain language of Section 73.3566(a) ("[a]pplications which are determined to be patently not in accordance with the FCC rules . . . will not be accepted for filing or if inadvertently accepted for filing will be dismissed" (emphasis added)).

8. In sum, Cornick's application is, by his own admission, violative of Section 73.215. It is therefore unacceptable for filing. Having failed to submit a curative amendment within the 30-day "amendment-as-of-right" period following the tenderability notice, Cornick's application must be dismissed. Reinstating his application and accepting his woefully late curative amendment would undermine the efficiencies derived from the "hard look" processing rules for FM applications. See Richard P. Bott, II, 3 FCC Rcd 6063 (1988).

#### CONCLUSION

Cornick's Opposition is both procedurally and substantively defective. It should therefore be rejected, Cope II's Petition

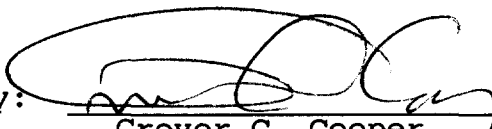
should be granted, and Cornick's application should be dismissed as unacceptable for filing.

Respectfully submitted,

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Dated: August 15, 1991

CERTIFICATE OF SERVICE

I, Julie K. Berringer, a secretary in the law firm of Fisher, Wayland, Cooper and Leader, do hereby certify that true copies of the foregoing "REPLY TO OPPOSITION TO PETITION TO DISMISS OR DENY" were sent this 15th day of August, 1991, by first class United States mail, postage prepaid, to the following:

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